Norton signs order that could open West to rights-of-way claims

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Outgoing Interior Secretary Gale Norton yesterday signed an order that could open thousands of roads across federal lands in the West to rights-of-way claims by state and county governments.

Interior officials say Norton is simply responding to a federal appeals court decision last September that said state law should have the final say on what constitutes a road, but environmentalists say Norton is attempting to fix department policy on her way out the door. She leaves office next week.

At stake is the ownership and management of thousands of miles of roads, trails and fence lines. Under an 1866 law known as RS 2477, states can claim rights-of-way that existed before land was designated as federal property. Environmental groups fear the law will be used to increase motor vehicle use and degrade environmental protections of federally owned land in Utah and elsewhere.

"This is just underhanded, secret, hastily developed policy from this administration as she's on her way out the door," said Kristen Brengel of the Wilderness Society. "I guess this is what she wants to be her legacy, opening up these public lands."

Environmentalists say the order will make it easier for states and counties to perform widespread, landscape-changing highway maintenance and construction on public lands, possibly leading to rights-of-way claims on federal lands across the West, including roads in national parks, wildlife refuges, national monuments and wilderness areas.

Norton's **secretarial order** is essentially a guidance memo to bureaus directing them to follow a 10th U.S. Circuit Court of Appeals ruling, said Dan Domenico of Interior's solicitor office. "It's just a memo from the secretary outlining guidelines based on the 10th Circuit case on how to handle existing roads," Domenico said. "It may in a few circumstances based on state law allow for more rights-of-way to go forward."

The 10th Circuit **ruling** said Utah's definition of roads that may qualify for RS 2477 claims supercedes the Bureau of Land Management's definition. Utah has a more liberal definition that states a road must be in continuous use for 10 years, while BLM stated that qualifying roads must be established via mechanical construction.

"We think the guidelines with the 10th Circuit are most appropriate, they're quite clear," said Lynn Stevens, Utah public lands policy coordinator. "And if she's implementing guidance based on the 10th Circuit ruling, the state is very happy about that."

Utah has previously threatened to sue Interior over the rights-of-way to more than 100,000 miles of trails, roads and other highways, including constructed highways in every national park in the state.

The 10th Circuit case centered on claims by Garfield, Kane and San Juan counties for RS 2477 rights-of-way in the Grand Staircase-Escalante National Monument. U.S. District Court Judge Tena Campbell ruled in June 2001 and February 2004 that 15 claims were invalid under RS 2477 because the trails in question were not "constructed highways," nor did they serve a public purpose, but the appeals court ruling will direct the district court to consider the "continuous use" definition, rather than BLM's.

The 10th Circuit panel did not direct Interior to make a new rule, but sent the case back to the district court for another trial (*Land Letter*, Sept. 15, 2005).

2003 agreement has 'served its time'

Yesterday's secretarial order also spells the end of an April 2003 agreement between Norton and then-Utah Gov. Mike Leavitt (R) that Interior had promoted as a deal that would prohibit claims of righs-of-way in national parks, wilderness areas and other sensitive lands.

Under the 2003 **memorandum of understanding**, the state and counties would submit right-of-way claims to the Bureau of Land Management for evaluation. BLM would then study the petition and choose whether to issue the "recordable disclaimer of interest" -- the official ruling that the federal government does not own or have interest in the land (*Greenwire*, April 10, 2003).

But that process never resulted in any successful rights-of-way claims by Utah, and although there was interest from other Western states, no state forged a similar deal with Interior.

"Both Utah and the department agree that in light of the agreement, that MOU has served its time and it's going to be set aside," said Larry Jensen, Interior regional solicitor in Utah.

Environmental groups, including the Southern Utah Wilderness Alliance, filed suit in 1996 claiming the counties illegally graded lands within the newly created national monument in order to facilitate a rights-of-way claim and possibly preclude future wilderness protections.

"There's never been a legal bar to the states making claims in those areas if that's what they wanted to do," Jensen said. "The MOU was an effort to break the 2477 logjams, and the state and department agreed they would concentrate on certain claims and not on others.

"If a state believes it has 2477 claim in a park, there's nothing barring them from making a claim," Jensen added. "We wouldn't be in a position in the department to stop it from making a claim."

The previous department policy was authored in the late 1990s by then-Interior Secretary Bruce Babbitt, saying no rights-of-way claims would be issued unless it was an emergency.

Domenico said under the 10th Circuit decision and yesterday's order, counties are entitled to perform routine maintenance, but anything beyond that they have to consult with Interior. "They can't unreasonably interfere with our right to protect federal resources, and we can't interfere

with their right to use the right-of-way they have, and that's right out of the 10th Circuit," Domenico said.

Stevens said the state agrees that it must consult Interior if it wants to improve the roads at issue, such as by expanding or resurfacing the roads. "Utah accepts the obligation to confer with the land management agency."